

NO. 20924

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND JOHN WAGNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

MANUEL L. REAL,
United States Attorney,

ROBERT L. BROSIO,
Assistant United States Attorney,
Chief, Criminal Division,

RONALD S. MORROW,
Assistant United States Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

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600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I STATEMENT OF JURISDICTION	1
II STATUTE INVOLVED	2
III STATEMENT OF THE CASE	3
A. Questions Presented	3
B. Statement of Facts	3
IV SUMMARY OF ARGUMENT	7
V ARGUMENT	8
A. THIS COURT HAS NO JURISDICTION OF THE INSTANT APPEAL.	8
B. THE DISTRICT COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE NO GROUNDS ARE RAISED IN THE INSTANT PROCEEDING WHICH WERE NOT RAISED ON APPEAL.	10
CONCLUSION	13
CERTIFICATE	14



TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Cambiano v. United States, 295 F.2d 13 (9th Cir. 1961)	12
Hastings v. United States, 184 F.2d 939 (9th Cir.)	12
Sanders v. United States, 373 U.S. 1 (1963)	10
Wagner v. United States, 264 F.2d 524 (9th Cir. 1959)	1, 10, 11, 12

<u>Statutes</u>	
Title 18, United States Code §2114	1, 2
Title 18, United States Code §3231	2
Title 28, United States Code §1291	2
Title 28, United States Code §1294	2
Title 28, United States Code §2253	8
Title 28, United States Code §2255	1, 2, 7, 8, 12

<u>Rules</u>	
Federal Rules of Civil Procedure:	
Rule 50(b)	9
Rule 59	9
Rule 60(b)	9
Rule 73(a)	7, 8

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I

STATEMENT OF JURISDICTION

Appellant was indicted by the Federal Grand Jury for the Southern District of California, Central Division, for a violation of Title 18, United States Code, Section 2114, armed robbery of a Postmaster (Wagner v. United States, 264 F. 2d 524 [9th Cir. 1959]). Following a jury trial, the appellant and his two co-defendants were sentenced to the custody of the Attorney General for twenty-five years (Wagner, id.). An appeal was taken from the above conviction and the conviction affirmed (Wagner, id.). Appellant filed the subject §2255 motion on October 25, 1965 [C. T. 2]. ^{1/} Following an Order on Motion Pursuant to 28 U. S. C. §2255

^{1/} "C. T. " refers to Clerk's Transcript.



filed and entered on November 2, 1965 [C. T. 20], the appellant filed a motion for reconsideration on December 20, 1965 [C. T. 22]. Said Motion for Reconsideration was denied by an Order of December 20, 1965 [C. T. 31]. On January 10, 1966, a Notice of Appeal was filed from the orders of November 2, 1965 and December 20, 1965 [C. T. 31].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2114 and 3231, and Title 28, United States Code, Section 2255.

If this Court has jurisdiction, then it lies pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTE INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was brought under the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . , or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the



sentence. . . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus.

. . . "

III

STATEMENT OF THE CASE

A. Questions Presented

1. Whether this Court has jurisdiction of the instant appeal.
2. Whether appellant may raise his substantive issues in light of the fact the same issues were raised on the direct appeal from his conviction, to wit:
 - a. Exclusion at trial of a teletype report.
 - b. Denial by the trial court of the request to inspect certain reports; and
 - c. Failure of the District Court to order the production of the name and address of "the 7-UP man".

B. Statement of Facts

On the afternoon of December 19, 1955, at about the hour of 2:30 P. M. Assistant Postmaster Bonner and Postmaster Martin left the Post Office at Bellflower to deposit postal funds and checks

in a bank at Bellflower, California [R. T. 104]. 2/ They proceeded from the Post Office in a Pontiac station wagon driven by Postmaster Martin. Martin was armed [R. T. 105]. They parked the station wagon in a parking lot to the rear of the bank. Immediately upon stopping the auto and when they, Bonner and Martin, started to get out of the car they were accosted: "a man accosted Martin with a gun . . . " [R. T. 106-107]. Bonner testified that he could not identify the man who accosted Martin with a gun [R. T. 107]. Postmaster Martin identified such person as co-defendant Vandergrift [R. T. 254-255]. Martin testified that this person, Vandergrift, " . . . approached on my side and stuck a gun in my side and demanded my gun" [R. T. 254]. That this person, Vandergrift, was also reaching in on the right side of Martin's coat trying to get his, Martin's gun [R. T. 255]. "So (Martin) I reached into the left to give him my gun, and at that time he pushed the gun into my ribs and told me to keep my hand out if I didn't want to get shot" [R. T. 255]. Martin testified that he was apprehensive of his life and that he felt his assailant meant business [R. T. 255]. That his shirt had a rip in it where the gun had jammed into his ribs [R. T. 256].

Bonner testified that the man on his side of the auto also had a gun [R. T. 107]. That this person demanded the money. This person, Bonner identified as the appellant Wagner [R. T. 108]. Bonner testified that he was certainly apprehensive of his life and

2/ "R. T. " refers to Reporter's Transcript.

was in fear when the gun was pointed at him and that he believed the men meant business [R. T. 109]. Bonner testified that the "man", "Wagner", took the money, that the two of them went to the rear of their car and then later came in front of their car, crossed the street and got in the get-away car that was double parked across the street on Maple Street, headed east [R. T. 109]. This car was described as a dirty-colored Oldsmobile. Assistant Postmaster Bonner stated he saw the driver of the get-away car very clearly, whom he identified as the co-defendant Cambiano [R. T. 110]. Postmaster Martin likewise identified Cambiano as the driver of the get-away car [R. T. 259-260].

Witness Bonner stated that there was a "7-UP" truck double parked on the street at the time they (he and Martin) went into the parking lot [R. T. 149]. That he later talked to the driver of this truck [R. T. 150]. That the "7-UP" man gave to him, Bonner, the license number of the get-away car [R. T. 178].

The Witness Robert Hunt stated that he was an insurance agent. That on December 19, 1955, he had parked his automobile on Maple Street [R. T. 226]. This car was parked on the opposite side of the street from Mr. Hunt's office. That he had gone to his car that afternoon and attempted to start his car when a man with a money sack or a brown canvas bag in one hand and a gun in the other appeared to the right of his car [R. T. 227]. Witness Hunt identified this person as the defendant Vandergrift [R. T. 228]. That this person was close to him, about four or five feet -- that he had blue eyes [R. T. 229]. Hunt described the get-away car as

a " '50, '51, oxidized, badly oxidized Oldsmobile, four-door sedan" [R. T. 229]. Hunt observed the driver of this car and identified him as defendant Cambiano [R. T. 230]. Upon cross-examination, he again identified Cambiano and gave a description of him as he remembered him [R. T. 242]. The witness Hunt conceded that his identification of Vandergrift was "doubtful" [R. T. 238]. Hunt made no attempt to identify appellant Wagner; he testified: "Another man crossed behind the first man, which I did not get a good look at" [R. T. 230].

Postmaster Martin identified Vandergrift as the person who approached his side of the car " . . . and stuck a gun in my side and demanded my gun" [R. T. 254-255]. Martin also identified Wagner as the person he observed on the opposite side of the car. " . . . I glanced over to my Assistant Postmaster and I noticed that another man was over there with a gun at his head" [R. T. 257]. That this person did not then have a mask on [R. T. 257]. Witness Bonner had testified that the mask over a part of Wagner's face had slipped down [R. T. 140]. Witness Martin also identified Cambiano as the driver of the car that the robbers used to make their get-away [R. T. 260].

IV

SUMMARY OF THE ARGUMENT

Appellant has affixed new legal labels to grounds that were raised in the appeal from his conviction to this Court.

The Notice of Appeal filed as a result of the denial of appellant's 2255 motion was filed outside of the sixty day limit set by Rule 73(a) of the Federal Rules of Civil Procedure.

The substantive grounds urged in the instant motion have been raised and ruled upon in appellant's direct appeal from his conviction.

The ground relating to exclusion of the teletype report is now couched in terms of causing a surprise to his counsel tantamount to rendering him, Morris Lavine, ineffective. A cursory examination of appellant's opening brief shows that this issue has been abandoned.

The subject motion phrases the denial of the request to inspect reports ground in terms of being denied the effective assistance of counsel. This ground has apparently been abandoned on appeal.

The denial of the trial court to direct the production of the name and address of "the 7-UP man" is now couched in terms of the willfull suppression of evidence.

ARGUMENTA. THIS COURT HAS NO JURISDICTION
OF THE INSTANT APPEAL.

The order on motion pursuant to 28 U.S.C. §2255 was filed and entered on November 2, 1965 [C.T. 20]. The Notice of Appeal was filed on January 10, 1966 [C.T. 31].

On December 20, 1965, there was filed a motion to reconsider the earlier denial of relief [C.T. 22].

" . . . An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. . . . "

Title 28, United States Code, Section 2255.

"In a habeas corpus proceeding before a circuit court or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. . . . "

Title 28, United States Code, Section 2253.

Rule 73(a) of the Federal Rules of Civil Procedure requires in part:

" . . . in any action in which the United States or an officer or agency thereof is a party, the notice



of appeal may be filed by any party within 60 days from such entry [of judgment]; . . . "

The motion to reconsider is not such an action as would postpone the date for the filing of a notice of appeal. Liberally construing the motion to reconsider, it may be categorized as a Rule 60(b) motion based on "any other reason justifying relief from the operation of the judgment".

Rule 60(b) also provides:

"A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation "

It may be argued that the motion to reconsider was in reality a motion pursuant to either Rule 50(b) or Rule 59 of the Federal Rules of Civil Procedure. Such motions, however, must be made within ten days of the entry of judgment, and, therefore, the motion to reconsider can be neither of said motions.

The notice of appeal was simply filed too late.

B. THE DISTRICT COURT'S JUDGMENT
SHOULD BE AFFIRMED BECAUSE NO
GROUNDS ARE RAISED IN THE INSTANT
PROCEEDING WHICH WERE NOT RAISED
ON APPEAL.

Assuming, arguendo, that this Court has jurisdiction of the instant appeal, the grounds urged in the instant proceeding were raised and ruled upon in the appeal from appellant's conviction. (Wagner, supra.) Appellant has merely changed the legal label by which he refers to each ground. In the language of Sanders v. United States, 373 U.S. 1 (1963), appellant is supporting identical grounds by different legal arguments. The Court's attention is directed to Sanders, at p. 16, for a complete and familiar explanation of the meaning of "ground".

To quote Judge Byrne in the instant matter,

"The ground of attack upon the judgment and sentence, as pleaded in the motion, is that the evidence adduced at the trial is not sufficient to identify the petitioner as a participant in the robbery; that the court erred in the admission of certain evidence, and further erred in failing to require the production of certain evidence; and

"It appearing to the court that questions as to the sufficiency of the evidence or involving errors, whether of law or of fact, must be raised by timely appeal from the sentence if the petitioner desires to raise them, and may not be considered in a Section

2255 proceeding.

"Hastings vs. U.S. (CA 9) 184 F.2d 939;

"Tucker vs. U.S. (CA 9) 225 F.2d 271;

"Brule vs. U.S. (CA 9) 240 F.2d 589;

"Black vs. U.S. (CA 9) 269 F.2d 38, 41-42;

"U.S. vs. Angelet (CA 2) 255 F.2d 383, 385.

"Indeed, in this case it appears that the petitioner did raise the questions on appeal from the sentence.

See

Wagner vs. U.S. , (CA 9) 264 F.2d 524.

"The files and records of the case conclusively show that the petitioner is entitled to no relief." [C. T. 30-31].

The motion to reconsider [C. T. 22], merely expands upon, and explains, appellant's position vis a vis "the 7-UP man".

When appellant originally raised the ground relating to "the 7-UP man" this Court held:

"Where a witness is equally available to both parties no inference should be drawn from the failure to produce such a witness. Shurman v. United States, 5 Cir. , 223 F.2d 272, 275. On like reasoning, where the name and address of a witness is equally available to both parties, no prejudice results from the denial of a motion requiring one party to supply that information to the other."

Wagner at 531.

In reference to the ground relating to the inspection of certain reports, this Court earlier held that the denial was proper because of an untimely demand and there was no proper foundation. Wagner at 532-533.

In reference to the ground urged pertaining to the teletype report this Court held that the conviction was supported by substantial evidence that Wagner was one of the robbers. Technically, appellant's present argument is addressed to the exclusion from evidence of a certain teletype report. Clearly, the admission or exclusion of evidence is not a collateral matter to be raised in a 2255 motion. Hastings, supra.

While Wagner is not raising the propriety of the instructions in his 2255 Motion, his co-defendant Cambiano did. Cambiano v. United States, 295 F.2d 13 (9th Cir. 1961). In affirming the judgment of Judge Byrne on Cambiano's earlier 2255 motion, this Court said:

"In the first place, errors in instructions must be corrected on appeal and may not be reached in a proceeding under Section 2255. Baules v. United States, 9 Cir., 1958, 258 F.2d 318. Secondly, judgment of conviction was appealed and the instructions which were given in the case were approved by this Court in Wagner v. United States, 9 Cir., 1959, 264 F.2d 524. "

295 F.2d at 14.

It is apparent that the same reasoning applies to the teletype, "the 7-UP man", and reports of various agents.

CONCLUSION

There being no error in the denial of appellant's motion,
the judgment should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

ROBERT L. BROSIO,
Assistant United States Attorney,
Chief, Criminal Division,

RONALD S. MORROW,
Assistant United States Attorney,

Attorneys for Appellee,
United States of America.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow

RONALD S. MORROW

